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Nos. 134, 135

In the Supreme Court of the United States

OCTOBER TERM, 1951.

ANNA F. LUDWIG MOSKOWITZ, ETHEL M. [illegible], APPELLANTS

v.

LOEW'S INC., ET AL.

GENERAL MOTORS CORP., APPELLANT

v.

THE UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE APPELLEES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 134

A/S. J. LUDWIG MOWINCKELS REDERI, ET AL., APPELLANTS

v.

ISBRANDTSEN CO., INC., ET AL.

No. 135

FEDERAL MARITIME BOARD, APPELLANT

v.

THE UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE SECRETARY OF AGRICULTURE

OPINIONS BELOW

The final opinion of the district court (R. 118) is reported at 96 F. Supp. 883. The opinion of

the district court in connection with the granting of the temporary injunction is reported at 81 F. Supp. 544, appeal dismissed, 336 U. S. 941. The report and order of the Federal Maritime Board (R. 51, 67) are reported at 3 F.M.B. 235.

JURISDICTION

The judgment of the district court was entered on April 5, 1951 (R. 148). The petitions for appeal were presented on May 16, 1951 (R. 150, 155), and were allowed on May 17, 1951 (R. 151, 155). The jurisdiction of this Court is conferred by 28 U.S.C. 1253.[1]

QUESTIONS PRESENTED

Section 14 Third of the Shipping Act, 1916, prohibits common carriers by water from retaliating against a shipper by refusing available space accommodations or "resort to other discriminating or unfair methods" because the shipper has "patronized any other carrier" or "for any other reason". Section 15 of the Act permits approval by the Board of rate-fixing agreements among carriers which, *inter alia,* are not "in violation of this Act".

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[1] At the time this action commenced, orders of the Maritime Board were initially reviewable by three judge district courts (§ 31, 39 Stat. 738, as amended, 36 U.S.C. 830). Such orders are now initially reviewable by courts of appeals (Act of Dec. 29, 1950, § 7, 64 Stat. 1130, 5 U.S.C., Supp. IV, 1037), but this change in procedure does not affect cases pending when the statute was enacted (§ 14, 64 Stat. 1132).

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The questions presented are:

1. Whether the contract/non-contract rate system, under which shippers who refuse to contract to give their exclusive patronage to members of appellant conferences of shipping lines are charged higher rates than are shippers who enter such exclusive-dealing contracts for the same service, is arbitrary and violative of Section 14 Third of the Act.

2. Whether, assuming that the contract/non-contract system violates Section 14 Third, conference agreements authorizing use of the system may nevertheless be approved by the Board under Section 15 of the Act.

STATUTE INVOLVED

Sections 14, 15, 16, 17, and 19 of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, are set forth in an Appendix, *infra*, pp 57-62.

STATEMENT

This is an appeal from a final judgment of a three-judge district court which (1) enjoins two conferences of steamship lines and members of the conferences from employing the dual rate-exclusive dealing contract system, known as the "contract/non-contract system", and (2) sets aside an order of appellant Federal Maritime Board dismissing a complaint of appellee Isbrandtsen before the Board seeking disapproval of agreements permitting use of the rate system. (R. 148-149.)

The parties

Appellee Isbrandtsen Company, Inc., the plaintiff below, is an American flag carrier by water engaged in the transportation of property between ports on the North Atlantic Coast and the Gulf of Mexico and ports in various parts of the world, including Belgium, Holland, and Germany (Am. Compl., par. 1, R. 1; Ans., par. 1, R. 41). Since 1933, appellee Isbrandtsen and a predecessor have maintained regularly scheduled sailings in such trade of a minimum of twice monthly, and in 1948 appellee Isbrandtsen operated 38 such sailings (R. 255). The two conference appellants (No. 134), defendants below, are rate-fixing associations of American and foreign steamship lines also engaged in such trade (Fdg. 1, R. 173). One of the conferences is comprised of carriers engaged in the West-bound trade, and the other of carriers engaged in the East-bound trade (*ibid.*). The carrier appellants (No. 134) are members of one or the other or both of these conferences (*ibid.*)

Appellant Federal Maritime Board (No. 135) [2] intervened in defense of its order (R. 41); appellee Secretary of Agriculture intervened on the

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[2] The Federal Maritime Board and its predecessors are hereinafter sometimes collectively called the "Board". Its predecessors were the United States Shipping Board (1916 to 1933); Department of Commerce United States Shipping Board Bureau (1933 to 1936); and United States Maritime Commission (1936 to 1950).

side of the plaintiff.[3] The United States (nominally the defendant in actions to set aside orders of the Board) also has aligned itself on the side of the plaintiff in contending that the dual rate system is unlawful (Ans., R. 45-8).

The proceedings below

a. *Preliminary proceedings in district court*

This action commenced in October, 1948, with the filing by appellee Isbrandtsen of a complaint in the court below. The complaint alleged that the conference and carrier appellants proposed to inaugurate on November 1, 1948, a dual rate system, under the terms of which shippers who failed to enter exclusive dealing contracts[4] with the conferences would be charged a "non-contract" rate some 20 percent higher than the existing rates. The existing rates would continue to be charged shippers who agreed to the contracts. It was alleged that the proposed system was in violation of Sections 14 and 15 of the Shipping Act, 1916, and that appellee Isbrandtsen, an independent

[3] The Secretary has participated in this case to represent agricultural interests in obtaining equitable transportation rates and services for shipments of agricultural products (see Agricultural Marketing Act of 1946, Sec. 203 (j), 60 Stat. 1087, 7 U.S.C. 1622 (j)), and to represent the Department of Agriculture's direct interest as one of the largest shippers in the world. A detailed statement of the interest of the Secretary of Agriculture in the problems presented by this case appears *infra*, pp. 14-15.

[4] A copy of the proposed East-bound contract is set forth in Exhibit D to the amended complaint (R. 31, 32-36).

carrier, would be irreparably injured if the system were allowed to be established. By way of relief, the complaint sought (1) to have two orders of the Board approving agreements of the conference appellants[5] set aside and enjoined in so far as the agreements purport to authorize use of the contract/non-contract rate system, and (2) to have a temporary and permanent injunction issue against the carrier and conference appellants restraining them from using the system. The carrier appellants filed a motion to dismiss.

The court below issued a temporary restraining order against use of the dual rate system, and thereafter held a hearing on the motion to dismiss and the motion for a temporary injunction. In January, 1949, the motion to dismiss was denied and the temporary injunction was granted. (R. 172.) The court filed an opinion (per Rifkind, J.)[6] in which it was noted that the orders of the Board challenged in the complaint had been entered without adversary hearings, but that the Board is empowered to cancel or modify any agreement whether or not previously approved by it. The court therefore concluded that it "should not at this stage pass on the validity of the agreements" until the Board "in accordance with its established procedure, has had an opportunity

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[5] The conference agreements involved are Agreement No. 4490-6 (Ex. A to Am. Compl., R. 11) and Agreement No. 7920-1 (Ex. C to Am. Compl., R. 26).

[6] *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (S.D. N.Y.).

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to pass thereon in an adversary proceeding" (81 F. Supp. at 546). Accordingly, the temporary injunction was conditioned upon appellee Isbrandtsen's diligent prosecution before the Board of a complaint challenging the validity of the conference agreements at issue (*id.* at 547).

b. *Proceedings before the Board*

Pursuant to the district court's order, appellee Isbrandtsen instituted a proceeding before the Board attacking the two conference agreements to the extent they sanction the contract/non-contract system (R. 167). Answers were filed by the carrier appellants (R. 177). The United States and the Secretary of Agriculture intervened on the side of the complainant (R. 263-4).[7]

At a prehearing conference held before an Examiner, counsel for appellee Isbrandtsen took the position that the issues presented raised questions of law purely, and that no evidence other than the basic documents involved was necessary; this position was disputed by appellants (R. 192-200). At the subsequent hearings appellee Isbrandtsen introduced the complaint in the district court, various conference agreements of the conference appellants, the proposed contracts, the new proposed tariff schedules, and notices to shippers of the adoption of the System (R. 274-283). Appellee

[7] The Pacific Coast Borax Company and Himala International Exporters and Importers also intervened on the complainant's side.

Isbrandtsen thereupon rested (R. 204, 284). The carrier and conference appellants proceeded to call a number of witnesses and to introduce a number of exhibits for the purpose, in general, of showing that both the conference system and the contract/non-contract system are beneficial, and that appellee Isbrandtsen has generally charged lower rates than those charged by the conference members.

After the hearings were concluded, the Examiner submitted a recommended decision (R. 202-224) in which it was proposed that the exclusive dealing contract rate systems "should be found not to be in violation, *per se*, of section 14 (3) of the Shipping Act, 1916" (R. 203). After hearing oral argument, the Board remanded the case to the Examiner, requiring him to file proposed findings of fact supplemental to his recommended decision (R. 229). Thereafter the Examiner submitted a supplemental recommended decision in which he concluded as follows with respect to Section 14 Third (R. 230, 252):

> The contract system proposed by respondents [conference and carrier appellants] is not unlawful *per se* nor is it a retaliation against shippers for patronizing any other carrier (see first recommended decision). In view of the beneficial effect of the system upon the trade over a period of years prior to World War II, it must be presumed that the reinauguration thereof would produce a similar effect. With that premise, there would not be

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> a resort by respondents "to other discriminating or unfair methods, because such shipper has patronized any other carrier." The use of the system, therefore, will not constitute a violation of section 14 (3) of the Act.

In December, 1950, the Board issued a report (R. 51-67) and order (R. 67) dismissing the complaint. The Board concluded that the language of Section 14 Third of the Shipping Act which prohibits carriers to retaliate against a shipper by refusing available space "or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier" should not be read literally, but should be read as prohibiting only "unjust" or "unreasonable" discrimination (R. 60). The Board based its ultimate conclusion that the system is not unlawful upon three grounds: (1) that such a conclusion is consistent with the administrative interpretation "uniformly given" the Act, (2) that the construction of Section 14 Third sought by appellee Isbrandtsen would make "impossible" any harmonious administration of the Act as a whole, and (3) that such a construction would "extend the application of section 14 (3) to carriers' activities generally, whereas we think application is limited to such retaliation as is there described" (R. 57).

c. *The final proceedings in the district court*

After the Board's order dismissing Isbrandtsen's complaint was filed, appellee Isbrandtsen amended

its complaint in the district court to include that order among the orders sought to be set aside (R. 1-9). Answers to the amended complaint were filed by the carrier appellants (R. 41) and the Board (R. 49). The United States filed an answer in which it conceded that the contract/non-contract rate system violated Section 14 of the Act, and that the orders of the Board should be set aside in so far as they purport to authorize employment of the system (R. 45, 47-8). Motions to dismiss the amended complaint were filed (see R. 149).

The court below,[8] after hearing, filed an opinion (per Frank, J., R. 118) and judgment (R. 148) making permanent the injunction against use by the conference and carrier appellants of the proposed contract/non-contract system, and setting aside the final order of the Board dismissing appellee Isbrandtsen's complaint. The court concluded that because the 20 to 30 percent differential here between the contract and non-contract rates was arbitrary, unreasonable and unjustly discriminatory between shippers (R. 121, 125-8), it was unnecessary to decide whether the contract/non-contract rate system is a *per se* violation of Section 14 Third (R. 120, 135).[9]

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[8] At the time of the preliminary hearing, the court consisted of Circuit Judge Frank and District Judges Rifkind and Samuel Kaufman. At the final hearing Judge Rifkind had been replaced by Judge Ryan.

[9] In an appendix by Judge Frank (not joined in by the other judges), the arguments on this question are analyzed without, however, any expression of opinion (R. 136-148).

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The contract/non-contract rate system

The decision here under review outlaws as unlawful the proposed differential between the rates to be charged "contract" shippers and shippers who do not execute the proposed exclusive patronage contracts. For the purposes of this appeal, it would therefore seem unnecessary to consider in detail the complexities of the conference system, the proposed tariffs or the proposed contracts.

The Examiner found [10] that the contract system has been in effect in the two trades under consideration for about 25 years (R. 206), and that it had had a "beneficial effect" upon the trade for a period of years prior to World War II (R. 252). He also found, however, that prior to World War II contract/non-contract rates had been applied to but 706 items out of some 1700 to 1900 items in the tariff, and that since March 2, 1946, the contract rate system has not been in effect in the present trade (R. 257). He further found that in October, 1948, shippers were advised by the conference appellants that on and after November 1, 1948, the present rates would be available only to those shippers who would sign proposed contracts under which the shipper would agree (for the period from

[10] The Examiner made no formal findings of his own, although he explicitly ruled upon each of the proposed findings submitted by appellee Isbrandtsen (R. 254-261). These rulings, and the recommended decision and supplemental recommended decision of the Examiner, seem to have been adopted by the Board, at least to the extent not inconsistent with the Board's report (see R. 53, 124).

November 1, 1948, to December 31, 1949) to effect all of his transportation requirements by means of the ships of conference members exclusively (R. 258).[11] And shippers were informed that failure to sign such a contract would entail application to their shipments by carrier appellants' lines of "non-contract rates which were fixed by means of an arbitrary differential at a level 20% to 30% higher than the currently existing scale" (Finding 14, R. 258). Although the Board did not in terms disapprove this finding as to the arbitrary character of the differential, it found substantially in the language of the statute (R. 66-7):

> The use of the dual rate system by the two conferences and their members is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and does not operate to the detriment of the commerce of the United States, and is not in violation of the Shipping Act, 1916, * * *[12]

The court below held that this ultimate finding was inconsistent with, and could not stand up in the face

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[11] A few classes of things were exempted (R. 257). Although the shipper was to be committed to the contract for the full 14 month period if the conferences left their rates unchanged, the conferences were authorized to increase those rates "reasonably" (R. 259-60). If the shipper declines to accept the increase within 20 days after notice, the conference may terminate the contract.

[12] The Board ordered a modification in the contract to eliminate an option on the part of the conference to terminate the contracts in case of violation by the shipper (R. 67). With that option eliminated (R. 44), termination of the contracts

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of the Examiner's specific finding that the differential was arbitrary (R. 125-6).

The Examiner found that the proposed contract obligated the merchant to effect all of his export shipments in the trade via appellants' lines, while the carriers were obligated only to furnish the merchant space at contract rates if suitable unbooked space was available when the merchant made application (R. 259). The Examiner concluded that there "can be little doubt that the contract system in the present trades, if allowed to become effective, would create a virtual monopoly * * *" (R. 221).[13] The Board did not disapprove this finding. It stated that "there is no evidence that the dual rate system has in the past, or will in the future, effectively cause the exclusion of an independent carrier from any trade route on which he wishes to operate" (R. 62-3). But the next sentence makes it clear that the Board recognized that *independents* might be eliminated, for it stated: "This is particularly apparent from the fact that

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for breach is now presumably mandatory. The Board approved a provision for liquidated damages in case of violation of the contracts by a shipper under which twice the amount that would have been paid to a conference line for the freight shipped via an independent line would be payable to the conference (R. 65).

[13] Apparently, however, he did not deem such a result undesirable, or unlawful, for he commented (R. 253):

> That the system does restrict complainant's [Isbrandtsen] operations and prevents shippers from using any carrier they please cannot be denied, but the Commission [Board] must not shut its eyes to realities. The conference system is sapped of its vitality if there be no method of binding the majority of shippers in the trade.

there is a standing invitation to all independents to join the conferences and to operate on the same footing with conference members" (*ibid.*).

INTEREST OF THE SECRETARY OF AGRICULTURE

The Secretary of Agriculture has intervened in this case (1) to represent the interests of the agricultural community in obtaining equitable transportation rates and services for shipments of agricultural products,[14] and (2) to represent the Department of Agriculture's direct interest as one of the largest shippers in the world.

It is important to the agricultural community and to the Department that shipping rates be competitive and reasonable so as to encourage and favor the exportation of American agricultural products. If the Conference lines can coerce shippers into discontinuing to patronize the non-Conference lines, and thereby eliminate non-Conference competition, then the economic freedom of bargaining of shippers becomes a nullity—having no place else to go, the shippers must accept Conference rates.

With a complete monopoly of the trade, the Conference lines would then have the economic power to charge much higher rates than would be possible with the restraining influence of independent com-

[14] Under § 203(j) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1622(j)), the Secretary is authorized and directed to assist in obtaining equitable and reasonable transportation rates and services for agricultural products by *inter alia* making complaint to the Federal Maritime Board and to other Federal and State transportation regulatory bodies.

petition. The position of the Secretary is that shippers of agricultural products should be free to bargain with both the Conference and non-Conference lines and thereby obtain the cheapest rates available—and obtain them without being retaliated against by means of higher "penalty rates" for patronizing the non-Conference lines. Congress, in enacting the Shipping Act, 1916, did not intend to sanction the destruction of free competition in ocean shipping, but sought rather to guarantee to shippers both the economic freedom of bargaining and right of equal treatment.

INTRODUCTION AND SUMMARY OF ARGUMENT

At the outset it must be noted that there can be no question of primary or exclusive administrative jurisdiction involved in this case. The Board has rendered its decision on the merits and that decision has been set aside by a three judge district court empowered by statute to review Board orders. Accordingly the application of the rule of *United States Navigation Co.* v. *Cunard S.S. Co., et al.*, 284 U.S. 474, with respect to the Board's primary jurisdiction of questions under the Shipping Act, is not in issue here.[15] (Compare Carrier and Conf. Appellants' Br. 11-12).

In the Government's view the central issue here is whether the dual rate system is a device to "re-

[15] In the succeeding case on the calendar, *Far East Conference, et al.* v. *United States*, No. 15 Misc., which also involves the contract/non-contract, rate system, the question of the application of the *United States Navigation* rule to an antitrust suit by the United States is presented.

taliate" by resort to other "discriminating or unfair methods" because a shipper has patronized any other carrier. Shipping Act, Section 14 Third. We believe that the system is retaliatory, discriminatory, and unfair on its face, and cannot be sustained under Section 14 Third. The district court based its conclusion that the contract/non-contract system is illegal on the ground that the differential between the two sets of rates is arbitrary, and therefore unlawful. Although the Government is of the view that this decision can be justified on the ground upon which it was placed, we rely mainly on the contention that under Section 14 Third *no* differential can lawfully be created between rates charged two shippers for the identical service merely because one shipper agrees to give all of his business to conference members.

Moreover, Section 14 Third does not stand alone. It is merely one of several provisions implementing the purposes of the Act "to enable an independent ship-owner to carry on his business, without having the shipping trust drive him out by discriminatory or unfair practices".[16]

These provisions include (1) a prohibition against deferred rebates, a device by which carriers give rebates to shippers who refrain from patronizing competitors, actual payment of the rebates being deferred to insure that the shipper

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[16] Statement of Representative James F. Byrnes, a member of the Committee which sponsored the bill that became the Shipping Act. 53 Cong. Rec. 8087.

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will continue to deal exclusively with the rebating carriers (Section 14 First);[17] (2) a prohibition against fighting ships, a device by which a particular steamer is selected by a conference to destroy the competition of non-conference lines, any loss from the lower rates charged for transportation by that steamer being borne by members of the conference generally (Section 14 Second);[18] (3) a prohibition against carriers inducing insurance companies to discriminate against competing carriers in the insurance rates charged (Section 16 Third); and (4) a provision denying interstate carriers the privilege of restoring rates which were cut unduly with a view to driving out a competitor unless the Interstate Commerce Commission finds a change in circumstances (Section 19).[19]

Appellants rely upon Section 15 of the Act as placing the entire question of the validity of the contract/non-contract system within the discretion of the Board. We propose to show that Section 15 cannot properly be so construed. It in terms empowers the Board to approve only such agreements as are not unlawful under the Shipping Act. No authority was conferred upon the Board to reverse the congressional policy embodied in Section 14 and sanction the type of economic war-

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[17] See Alexander Report, H. Doc. 805, 63rd Cong., 2nd Sess., 287.

[18] *Id.* at 289.

[19] *Id.* at 423. This provision was presumably made applicable to domestic carriers only because there is direct rate regulatory power with respect to them only.

fare which is represented by the contract/non-contract device.

The Shipping Act reflects congressional approval of the principle of voluntary collective action by shipping lines with respect to rates and services. It did not adopt the policy, however, that all shipping lines should be forced into conferences or out of business. To the contrary, the statute shows in its clear terms and in its history the determination of its framers that the combined economic power which the conference system creates shall not be used as a weapon against independent shipping lines or against shippers who wish to patronize them. The prohibitions against retaliation, deferred rebates and fighting ships alone establish this intention beyond peradventure. Appellants seemingly recognize that these methods of eliminating independent carriers could not be sustained by the Board. Yet the deferred rebate and the contract rate are identical in purpose, do not differ substantially in operation (cf. *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 307), and lead to the same end result—namely, freezing out of non-conference lines. Both rest upon the use of rate discrimination as a method of rewarding the shipper who gives all of his business to conference lines and penalizing the shipper who does not, or will not agree thus to limit himself.[20]

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[20] The suggestion in a dictum in the *Swayne & Hoyt* case, *supra*, at 307, note 3, that the deferred rebate has a greater tendency to tie the shipper to the carrier would seem to be of

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Perhaps the clearest statement of the nature and effect of the contract/non-contract system is found in a concession by the Board in its brief below. That statement, as quoted by the district court, is as follows (R. 124-5):

> *"The contract system should be frankly recognized as a device tending towards the monopolization of ocean commerce in particular trades by the members, collectively, of conferences which serve those trades.* We use the word 'monopolization' with no ideological overtones, but merely in its dictionary sense, which is the obtaining or assumption of 'exclusive possession or control.' Whether the contract system in a particular case actually has the effect of producing a complete monopoly (i.e., control of a trade) depends upon how well it works; admittedly, it is monopolistic in purpose. The extent to which it is monopolistic in effect depends upon how successfully that purpose is achieved. * * * *The record warrants the conclusion that if a contract system is wholly effective, it will result in a complete monopoly in the sense that all cargo moving in a trade where the system is used, will move in ships of conference carriers.* Neces-

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little practical significance since either system, if widely used, will obviously drive independents into the conferences or out of business. Once that result is accomplished, no device to coerce exclusive patronage of conference carriers need be employed. In the same dictum this Court recognized that "The policy of the statute [against shippers being compelled to deal with conference lines] may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly" (*ibid.*).

> sarily, in these circumstances, there would be no service by independent operators. * * * *In considering the system itself* (precedent to examination of specific contract provisions), *we feel that this court should assume that the conference contracts are in fact effective;* that shippers sign them in substantial numbers, voluntarily or as a choice of evils; that they exclude Isbrandtsen from carrying the freight of all shippers who sign; and that the contracts seriously restrict Isbrandtsen's access to cargoes for its ships, and will continue to do so if, and as long as, the conferences employ the contract system and Isbrandtsen remains a non-member." [Italics added.]

It therefore becomes evident that appellants have assumed a formidable task. If they are to prevail, they must demonstrate that a discriminatory rate device, whose purpose and probable effect are to put out of business any carrier which fails to become a conference member, may be approved under the authority of, and purportedly in furtherance of the policy of, a statute carefully designed to prohibit practices having such a purpose and effect. We shall show that such a result is inconsistent not only with the statute itself but with its legislative history, prior judicial interpretation, and with virtually contemporaneous administrative constructions by the Board's predecessors.

ARGUMENT

I

The Contract/Non-Contract Rate System Is Retaliatory, Discriminatory and Unfair Within the Meaning of Section 14 Third of the Shipping Act

Section 14 of the Act provides that "no common carrier by water shall, directly or indirectly,"

* * * * *

> Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

A. *Non-contract rates represent retaliatory action against shippers for patronizing non-conference carriers*

In October, 1948, shippers were advised in peremptory terms that they must sign exclusive dealing contracts or have their rates raised.[21] Plainly,

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[21] Circulars sent out by conference and carrier appellants contained the following (R. 31):

> Enclosed please find, for your prompt acceptance, offer of contracts for the period November 1, 1948 to December 31, 1949.
>
> It is important that advice of acceptance of these contracts is in the hands of the Carriers promptly. This will avoid application of the higher non-contract rates of the Carriers tariff and to accomplish this we therefore urge that you sign and return the enclosed forms to us by return mail.

such raising of rates is retaliation, as the term is ordinarily understood, against those shippers who refuse to boycott independent lines. The Board, however, did not regard this as "real retaliation" (R. 61). It thought that retaliation connotes vengeance, returning like for like. The higher rate is charged, the Board thought, merely because a shipper "voluntarily declines to give his exclusive patronage" and to sign the exclusive patronage contract, not because the shipper patronizes other carriers (R. 60).[22]

The reasoning upon which this conclusion is based is obscure. Section 14 Third prohibits retaliation because the shipper has patronized other carriers or "for any other reason." Thus the question whether the retaliation is caused by the failure of the shipper to sign the exclusive dealing contract, or by his actual trading with independents, becomes a matter of academic speculation, the answer to which is legally as well as practically immaterial. The argument, a dubious one at best,[23]

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[22] The examiner rationalized the result differently (R. 217): "The non-contract rate * * * is the return to the carrier for services performed, whereas the contract rate is a *dividend* to the shipper flowing from the contract". [Italics added.] Plainly the "contract" shipper receives no dividend here, since he continues to pay the same rate he paid before. The "non-contract" shipper is assessed or penalized the 20 to 30% differential.

[23] Threats are by definition based upon future conduct, yet threats may certainly be a part of retaliation. Indeed, Congress made it unlawful in Section 14 Third to "Retaliate * * * by * * * threatening to refuse" available space accommodations. It cannot seriously be argued that threatening to charge a penalty rate is less retaliatory.

that retaliation relates to retribution for past action only also fails to advance appellants' cause. The higher rates are in fact levied at a time when the shipper's act of independence has occurred, *i.e.*, become past. He has either declined to sign a contract, or, having signed one, has failed to adhere to it. At that point he must pay 20 percent to 30 percent more for the identical service which the contract shipper receives at the old rates. The only difference between retaliation by the contract/non-contract method and simple retaliation against those who trade with competitors is that the former method applies the rate sanction sooner. The shipper who even considers patronizing independents, and is therefore unwilling to contract not to do so, is subjected to the penalty rate.

The Board's theory—that the statute permits retaliation for failure to agree not to do the very thing (patronize independents) which the statute seeks to protect from retaliation—would give the conferences *carte blanche* to engage in the abuses which Congress was at pains to prohibit. Thus, for example, Section 14 Third prohibits, in unqualified language, refusal of available space because the shipper has patronized other carriers. But what of a contract system in which "contract" shippers agree by their contracts not to seek or use space in conference ships if they breach the exclusive dealing contract, and "non-contract" shippers are denied space altogether? Under the Board's

theory, the "contract" shipper who is thereafter denied space is suffering only for his breach of contract; the non-contract shipper is being refused space for his "voluntary" refusal to sign contracts. By this train of reasoning, the statute would be eviscerated. It needs no argument that statutes are to be interpreted in a manner which effectuates rather than frustrates the major purposes of their framers. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 542.

B. *The charging of two different rates for the identical service is a "discriminating method"*

The contract/non-contract rate system violates Section 14 Third because it is a "discriminating method" used against any shipper who has not signed the exclusive contract.

It is difficult to conceive of a clearer case of discrimination than that which results when two shippers are charged different rates for like services.[24] And it is beyond dispute that the discrimination is imposed in any particular case because of the shipper's refusal to give up his right to patronize any carrier he chooses.

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[24] Authority is hardly needed to establish this proposition. See *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 303. ("The differential [between contract and non-contract rates] • • • was prima facie discriminatory since the two rates were charged for identical services and facilities"); and *Contract Routing Restrictions*, 2 U.S.M.C. 220, 225; *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 452; *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S.B.B. 41, 45-6.

Appellants suggest three possible theories upon which the practice here involved may be considered non-discriminatory within the meaning of the Section. First, it is argued that there is no discrimination among shippers—all have the opportunity to be charged the lower rates simply by signing the exclusive dealing contract. This theory, that Hobson's choice suffices, makes a mockery of the plain congressional purpose of preventing shippers from being forced to the choice between knuckling under to the conference lines completely, or suffering discrimination by them. Moreover, it fails to explain the nature of the additional service for which the non-contract shipper is being charged. As the Maritime Commission, the Board's predecessor, aptly put it in *Contract Routing Restrictions,* 2 U.S.M.C. 220, 226:

> Respondents argue that shippers may, if they choose, refrain from entering into contracts, but they overlook the fact that with the choice goes the *penalty* of the higher noncontract rates. Equality of treatment is not accorded the shipper merely by giving him the opportunity to enter into *discriminatory contracts* in the same manner as offered to all shippers. [Italics added.]

And see *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.,* 1 U.S.S.B. 41, 45-6, quoted *infra,* p. 41.

This Court recently found it necessary to remind a regulatory agency that where a statute

forbids discrimination among shippers, any rate differential must be justified in detail on the basis of rational differences, such as the relative costs of services rendered. *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. And in *Alabama Great Southern R. Co.* v. *United States*, 340 U. S. 216, 227, this Court described the *Mechling* situation as "a plain case of discrimination. There were different rates provided for equal service without any showing [25] that any additional service was rendered for the additional charge." Here there is not even an attempt to show a difference in service. The asserted justification for the differential is that it is desirable to have the stability which is said to follow from the conference lines being assured of 100 percent of their customers' business. As the report of the Board put it (R. 63-4):

> If the conference members are to provide the service which the shippers value, the service must be matched by a regular availability of cargo from those shippers.

But this statement appears to be only another way of expressing the thought that it is appropriate for independents to be forced to join the conferences

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[25] This Court has also upheld the rights of passengers to equal treatment in the face of administrative findings that a particular racial discrimination was not unjust. *Mitchell* v. *United States*, 313 U.S. 80; *Henderson* v. *United States*, 339 U.S. 816.

or withdraw from the trade.[26] Unless the independents are entirely eliminated, perfect "stability" cannot be achieved. Maximum predictability of the traffic volume which is to be carried by conference lines occurs only in a situation in which there are no competitors. Similarly, complete elimination of rate competition can be assured only if all carriers are in the conferences. The contract/non-contract system is plainly designed to achieve this result, as the Board has conceded (*supra*, pp. 19-20). Shippers will not willingly pay the arbitrary 20 percent or 30 percent penalty which the conferences have imposed. As a practical matter, most important shippers cannot rely upon appellee Isbrandtsen alone (see Answer of carrier appellants, par. 30, R. 43). Since shippers must patronize conference lines, their only practical alternative is to discontinue patronizing appellee Isbrandtsen.

The second argument that is used to justify the dual rate system as non-discriminatory within the meaning of Section 14 Third is based upon reading into the Section the qualifying adjectives "un-

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[26] It is significant that the contracts do not guarantee shippers any service at all (*supra*, p. 13). The obligation of the shipper to give the conferences his business exclusively is not matched by any correlative obligation of the carriers to provide space. Of course, if the conference lines cannot furnish space the shipper is free to go elsewhere, but if appellants' view prevails, the shipper is unlikely to have anywhere else to go.

just" or "unreasonable." This construction finds no support in the legislative history of the statute. Indeed, the legislative history indicates that the use of the *unqualified* term was deliberate. The report of the Alexander Committee [27] reflects the strong urging of shippers that such an absolute ban be imposed. Thus, in summarizing the recommendations which it had received, the Committee stated (p. 313):

> Briefly stated, it was the consensus of opinion that discrimination between shippers in the matter of rates and cargo space should be absolutely prohibited * * *.

And the Committee recommended "that, with due regard to the proper loading of the vessel and the tonnage available, discrimination between shippers * * * in the matter of rates * * * be prohibited" (p. 421).

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[27] The Alexander report was prepared by the House Committee on the Merchant Marine and Fisheries pursuant to resolutions in the 62nd Congress (R. Res. 425, 587) and the 63rd Congress (H. Res. 205), and was submitted during the 63rd Congress in 1914 (H. Doc. 805, 63rd Cong., 2nd Sess.). A bill largely carrying out the recommendations of the Report was introduced (H.R. 17328), but not passed. In the 64th Congress the bill was reintroduced in substantially the same form (H.R. 15455, 64th Cong., 1st Sess.) and the report of the Committee recommending the bill quoted verbatim the recommendations of the Alexander report, and stated that the bill had been framed in large part upon the basis of its recommendations. H. Rep. 659, 64th Cong., 1st Sess., 27. The Senate Committee also adopted the recommendations of the Alexander report. S. Rep. 689, 64th Cong., 1st Sess.

That the drafters of the Act did not intend "discriminating" in Section 14 Third to be construed as "unjustly" or "unreasonably" discriminating, and that they recognized that it could make a difference whether such qualifying words were added, is shown by their use of the two phrases "discriminating or unfair" and "unjustly discriminatory or unfair" in respective bills introduced in Congress by Chairman Alexander. When the Shipping Act bill was first introduced in the 63rd Congress by Chairman Alexander (see H. R. 17328, 63rd Cong., 2nd Sess.) and referred to the Committee on Merchant Marine and Fisheries, Section 2 Third of the bill (which corresponded with Section 14 Third of the Act) had the phrase "discriminating or unfair" (method) in it as Section 14 Third of the Act does today. Section 3 of that bill (which corresponded with Section 15 of the Act), however, specified that the Interstate Commerce Commission was empowered to disapprove agreements which it found to be "discriminating or unfair" as between shippers.

Later, in the 64th Congress, when Chairman Alexander introduced H.R. 15455 (the bill which became the Shipping Act), the phrase "discriminating or unfair" in Section 3 of H.R. 17328 (63rd Cong., 2nd Sess.) had been changed in H.R. 15455 (64th Cong., 1st Sess.) to "unjustly discriminatory or unfair." The phrase "discriminating or un-

fair" (method) in Section 2 Third of H.R. 17328 (63rd Cong., 2nd Sess.), however, was unchanged in H.R. 15455. From this, it can only be concluded that had the Alexander Committee wanted to insert the qualifications "unjustly" into Section 14 Third, it would have done so at the same time.

Nor can appellants' construction be justified on the theory that it is necessary in order to render the Section harmonious with Section 15 or other sections of the Act. As is demonstrated in Point II, *infra,* none of those sections is inconsistent with an interpretation of Section 14 Third based upon its plain meaning as written.

Moreover, even if the Board's interpolation of "unreasonable" or "unjust" were to be accepted, it would not follow that the discrimination here could be sustained. As the court below pointed out (R. 120-1), the differentials between the contract and non-contract rates are wholly arbitrary. The Board has in effect ruled that discrimination against shippers who patronize non-conference members is a legitimate weapon of economic warfare, in disregard of the fact that Congress has clearly provided to the contrary. The Board's statement is sharply to be contrasted with the view of undue discrimination expressed in the earlier decision of the Shipping Board in *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.,* 1 U.S.S.B. 41, 45. In that case the following language from this Court's opinion in *Western Union Tel. Co.* v. *Call*

Pub Co., 181 U.S. 92, 100, was regarded as furnishing the proper standard of judgment:

> all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. * * * But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination.

It is difficult to surmise what kind of discriminatory rate system the appellant Board would regard as not justified. Its order in this case does not disclose the criteria it employs, or which it deems to have been established by Congress. There is in this case no difference in services which could justify a difference in rates. The Board's theory of its authority under the Act seems to be that a penalty rate, which is great enough to insure that all shippers who utilize conference lines use them exclusively, is not unjustly discriminatory, irrespective of the complete absence of any showing that the difference in rates is justified by any difference in services. The Board apparently sees no evil in making it impossible for independent lines to function as such, or any inconsistency with the policy considerations

embodied in the Act. For the Board's reply to arguments stressing this very real risk is that independents have "a standing invitation" to join the conferences (R. 63).[28] We think Congress manifestly intended that independents should not be deprived of the opportunity to survive on their own, and that they should not be forced to accept the "invitation" in order to survive. The contract/non-contract system bids fair to deprive them of that opportunity.

Finally, it is argued that if Congress had wished to prohibit the contract/non-contract system it would have done so explicitly by name, as it did in the case of deferred rebates and fighting ships. Thus the Board quoted with approval the following from the prior decision in *Pacific Coast European Conference Agreement,* 3 U.S.M.C. 11, 16 (R. 58):

> Contrary to the arguments made to us, Congress was informed before it passed the Shipping Act, 1916, of the existence of the contract rate system as well as of the deferred rebate system. Congress took occasion to prohibit the latter specifically. It is reasonable to suppose that had it intended to prohibit the former it would have said so with equal force.

There are many difficulties with this argument, which treats illustrative categories as if they were

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[28] And see the candid concession of the Board in the court below (*supra*, pp. 19-20) as to the tendency of the system toward complete monopoly by the conferences.

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plainly exclusive. Cf. *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 189. In the first place, it is obvious that Congress was not referring to deferred rebates or fighting ships in Section 14 Third. If the references in the Section to retaliation by "resort to other discriminatory or unfair methods" are not to be disregarded as surplusage, they must be read as covering practices *not* prohibited by name. Concededly, the abuses upon which the Alexander Committee primarily focused were the ones which it singled out for mention. And the report shows that the most widespread and generally criticized practices at that time were the deferred rebate[29] and the fighting ship.[30] The contract rate system was not in general use, nor was it made applicable to commodities generally. But in its summaries of conference practices and proposals made to it, and in its own recommendations, the Committee reflects concern with rate discrimination generally and the use of such discrimination against independent carriers and shippers who patronize them.[31]

There is no basis in the Alexander report for the conclusion that the contract/non-contract rate system was given the Committee's blessing. Certainly nothing in the Alexander report can be fairly described as even implicit "approbative

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[29] See 53 Cong. Rec. 8095. The Alexander report states that the deferred rebate "has proved by far the most effective device for the control of a trade". H. Doc. 805, 63rd Cong., 2nd Sess., 287.

[30] *Id.* at 289-90, 304.

[31] *Id.* at 290-2, 307, 411, 417, 420, 421, 423.

attention" to the system (R. 59).[32] The nearest that the Committee came to approving the system was to state, in a summary of contentions as to disadvantages of shipping conferences and agreements as then conducted, that (p. 307):

> By deferring the payment of the rebate until three or six months following the period to which the rebate applies ship owners effectively tie the merchants to a group of lines for successive periods. In this connection *it is argued* that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system. [Italics added.]

Plainly, this is not a statement of approval but merely a statement of a contention made before the Committee which the latter neither expressly approved nor disapproved. It is equally plain that, if either system is successful, the shipper will be dependent upon the conference lines because there will not be any non-conference line left functioning. See *supra*, pp. 18-19, n. 20.[33]

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[32] That the Alexander Committee desired to outlaw *all* discriminatory methods against shippers, and without any exception for rate discrimination by means of a contract device, is further shown by the committee's recommendation on page 30 of its report (H. Rep. No. 659, 64th Cong., 1st sess.) that:

> * * * with due regard to the proper loading of the vessel and the tonnage available, *discrimination between shippers* or ports *in the matter of rates* and space accommodations be prohibited. [Italics added.]

[33] The dictum in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 307, that "The Committee recognized that the ex-

The Alexander Committee was acutely aware that conferences are in a position, unless stopped by law, to use their combined power to force shippers who are partly dependent upon the service of the conferences to boycott independent carriers entirely. Thus, in discussing the vice of space refusal as a retaliatory method, the Committee said (p. 288):

> * * * as has been repeatedly pointed out in this volume, shippers require, above all else, a regular service, and in this connection the testimony shows that by patronizing an outside line the shipper would not only forfeit his rebates but could be penalized by being denied accommodations for future shipments even at the full rates of freight. Such retaliation would leave the shipper unprotected since an independent line is not large enough to supply him with tonnage at all times. In other words, the conference lines, by rotating the sailings of their steamers, can give a regular and frequent service, whereas the independent line with its fewer steamers can only offer sailings at less frequent intervals.[34]

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clusive contract system does not necessarily tie up the shipper as completely as 'deferred rebates,' since it does not place him in 'continual dependence' on the carrier * * *" appears to be an inadvertent overstatement of the Committee's position.

[34] In the present case, the carrier appellants admitted that "most important shippers cannot rely exclusively upon plaintiff [Isbrandtsen] for all their transportation requirements." Ans., par. 30, R. 43.

C. *The contract/non-contract rate system is an "unfair method"*

The contract/non-contract rate system is also unlawful in that it constitutes an "unfair method" used against independent shippers. Concededly, the term "unfair" is a general one with many meanings in different contexts. We believe, for all the reasons set forth in the preceding sections of this argument, that in the context of Section 14 Third the term must be read broadly. In using a term like "unfair", Congress obviously had in mind the abuse of the combined economic power of the conferences to squeeze independents and shippers. If it is unfair (and Congress appears to have thought that it is) to refuse available space to a shipper because he has patronized another carrier (Section 14 Third), it is equally unfair to offer the space, but only at a penalty rate. Similarly, if deferred rebates and fighting ships are unfair, coerced exclusive dealing contracts can hardly be regarded as fair.[35] Mani-

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[35] A hypothetical case illustrates the close similarity of the deferred rebate and the contract rate. Under the old deferred rebate system, Shipper A and Shipper B would each pay $100 for identical shipments over a conference line. Shipper A, however, would sign an exclusive patronage contract entitling him to a 10 percent rebate to be paid sometime after the expiration of the contract, provided he has patronized conference lines exclusively during the entire period. After he receives the $10 rebate, his actual rate would be $90. Shipper B, a non-contract shipper, would receive no rebate and thus would have paid a $10 higher rate.

Under the contract rate system, as here proposed, Shipper B, the non-contract shipper, still pays $100. Shipper A, who has signed an exclusive patronage contract, pays only $70 or $80.

festly, it is unfair to impose penalties of 20 to 30 percent (and in some cases 40 percent, R. 435, 1115) in increased rates in order to coerce shippers to abandon their economic freedom to patronize carriers of their choice.

The term "unfair" as used in this Act has been judicially construed and has also been construed by the Board. In *Prince Line* v. *American Paper Exports*, 55 F. 2d 1053, 1055 (C.A. 2), a proceeding concerning Section 16 of the Shipping Act, the court, through Judge Learned Hand, defined an "unfair" device as one which "destroyed that equality of treatment between shippers, which it was the primary purpose of the section, and for that matter of the whole statute, to maintain." And in *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41, 45-6, decided in 1922, the Shipping Board, in disapproving the contract/non-contract system under Sections 16 and 17 of the Act, made the following pertinent observations:

> It is suggested on behalf of the carrier that as the complainants were extended full opportunity to avail themselves of the lower rates by agreeing to the same condition which contract shippers had accepted, they were ac-

but is subject to penalties if he patronizes any non-conference line during the period of the contract.

In each case, Shipper B pays a higher rate solely because of his refusal to trade exclusively with the conference lines. Since the custom has generally been to employ deferred rebates of 5 to 10 percent (Alexander report, *supra*, p. 287), the discrimination involved in the contract/non-contract system here is actually two to six times as great.

corded the substantial equality of treatment contemplated by sections 16 and 17 of the act. This contention, however, is as unconvincing here as when used in support of *other kinds of unjust discrimination resulting from unfair conditions* imposed by carriers upon shippers. Under the statute, the complainants, as members of the shipping public, were entitled to have their shipments carried at the same rates as other patrons who received identical service. This right attached to each individual transportation transaction as such, and was not to be predicated upon any condition imposed by the respondent restricting the complainants' freedom of choice as to what carrier or carriers they should elect to patronize in connection with subsequent shipments. [Italics added.]

D. *The dual rate system has not received any consistent judicial or administrative sanction*

The validity of the contract/non-contract rate system has been before this Court twice previously. In one case, *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, the issue here presented was raised but not reached by the Court. In the other case, *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, the contention that the dual rate system violates Section 14 Third was not argued to or passed on by the Court. In the *United States Navigation* case, *supra*, the contract/non-contract system was challenged in a private antitrust suit. This Court concluded that private antitrust remedies

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had been partially superseded by the Shipping Act, and that even a device which appeared unlawful on its face under the Shipping Act should first be passed upon by the agency which administers that Act. Thus the Court recognized that the system appeared to be in violation of the Shipping Act (pp. 485-486) but also recognized a *possibility* that the system might be valid (pp. 487-488).

In the *Swayne & Hoyt* case, *supra*, the question of validity of the dual rate system under Se tion 14 was not in issue. The Board had concluded that the system as there employed violated Section 16 of the Shipping Act which makes it unlawful to give "undue or unreasonable" preference or advantages. Since the case arose under a section obviously involving administrative discretion, this Court's opinion was cast in terms of the reasonableness of the Board's exercise of discretion. The contention that the contract/non-contract system is violative of Section 14 was not argued to the Court.[36]

We submit that it is evident that the above cases, at the least, leave open for decision the question of the validity of the contract/non-contract rate

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[36] The Court noted in passing that the "the operation of the contract system, in the circumstances of this case, does not differ substantially from that of 'deferred rebates' outlawed in both foreign and coastwise shipping by § 14" (300 U.S. 307). In a footnote to this comment, the Court suggested that the Alexander Report "did not condemn the contract system completely" (*ibid.*). As has been pointed out, *supra*, pp. 34-35, n. 33, this Court appears inadvertently to have treated a statement of a *contention* in the Report as if it were a statement of the Committee's *conclusions*.

system under Section 14 Third of the Shipping Act.

The report of the Board relies heavily upon what it characterizes as "the interpretations which our predecessors have uniformly given since the adoption of the Act since 1916" (R. 57). The same decisions have been rather more critically (and accurately) described by the court below as having "lacked uniformity and consistency" (R. 130).[37]

The Board's prior decisions are not binding upon it, and of course are not binding upon this Court. We discuss them briefly here only to stress (1) that their divergencies totally preclude any reliance by appellants upon "consistent administrative construction," and (2) that the Board which was closest in time (1922) to the Congress (1916) which enacted the statute disapproved the dual rate system as unjustly discriminatory in the strongest of terms.

There have been relatively few reported decisions of the Board, or its predecessors, dealing with the contract/non-contract system. In four of these cases the system was disapproved in the circumstances, and under the particular sections of the Act involved. *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41 (1922); *Intercoastal Investigation*, 1 U.S.S.B.B. 400 (1935); *Contract Routing Restrictions*, 2 U.S.M.C. 220 (1939), *Gulf Intercoastal Contract Rates*, 1 U.S.S.B.B. 524, approved sub nom. *Swayne &*

[37] See discussion of some of these decisions in a long footnote to the district court's opinion (note 22, R. 130-1).

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Hoyt Ltd., et al., v. *United States*, 18 F. Supp. 25 (D.D.C.), affirmed, 300 U.S. 297. In two cases (*Rawleigh* v. *Stoomvaart et al.*, 1 U.S.S.B. 285 (1933); *Pacific Coast European Conference*, 3 U.S.M.C. 11 (1948)) the system was approved. In *Phelps Bros. & Co., Inc.* v. *Cosulich-Societa, Etc.*, 1 U.S.M.C. 634 (1937) the application of the system was found to result in unjust discrimination as between an independent shipping company and conference members, but the Board's solution was to give the conference 10 days in which to admit the independent to membership or risk having the conference agreement disapproved. In the same case, it was held that no discrimination as between shippers had been shown. A similar result was reached in *Sprague Steamship Agency, Inc.* v. *A/S Iravans Rederi*, 2 U.S.M.C. 72 (1939).

The *Eden* case, *supra*, held the system unlawful under Sections 16 and 17 of the Act, which are less emphatic in their strictures against discrimination than is Section 14 (see *infra*, pp. 60-61). The Board stated, *inter alia* (1 U.S.S.B. at 45):

> It is evident that the purpose of Congress in enacting these provisions of the statute was to impose upon common carriers within the purview thereof the duty of charging uniform rates to all shippers receiving a similar transportation service. The duty of the respondent under these sections was to serve the public impartially * * *

Appellants say that this case rested on its particular circumstances and that the Board did not hold that the contract/non-contract system is unlawful under Section 14 (3). But we think it clear that if the *reasoning* of the *Eden* case be accepted, the dual rate system cannot be sustained under the plain language of Section 14 (3). To the same effect is *Intercoastal Investigation, supra:*

> The prohibition of discrimination means, among other things, that no difference or distinction shall be made in rates that coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business which under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor [1 U.S.S.B.B. at 456].[38]

In the *Rawleigh and Pacific Coast European Conference* cases, *supra,* the Board sanctioned the use of the system in terms which, we believe, can be reconciled only superficially with the foregoing cases. And there are glaring inconsistencies in

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[38] The same decision contains the following statement as to the purpose of the Shipping Act (1 U.S.S.B.B. at 451-2):

> An underlying purpose of the Shipping Act, 1916, is to prevent every form of favoritism based upon the relations of the shipper with the carrier as a customer and to place all shippers, the large and small, the steady and occasional, upon a plane of equality in the right to service. For this reason that act condemns and makes unlawful every regulation, device, or subterfuge which undertakes to give to anyone an advantage based upon conditions other than those inhering in the transportation itself and alone.

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the cases upholding the practice. Thus, in 1948, in *Pacific Coast European Conference,* it is said that "*Menacho* v. *Ward* (1886), 27 Fed. 529, is the only case, as far as we know, which has held the [contract] system to be illegal *per se.* That decision, however, cannot be considered as a controlling precedent in view of the subsequent enactment of the Shipping Act * * *" (3 U.S.M.C. at 15-16). Between January, 1948 and December 1, 1950, when the present case was decided, it would appear that a drastic change occurred not only in the holding of the *Menacho* case, but in its bearing on the Shipping Act. For in the present decision we find the Board holding that the Act *codifies* the *Menacho* decision, and that the decision in *Menacho* supports the Board's position (R. 62).

At the outset, it is clear that the *Menacho* decision did not purport to be applying any general rule against discrimination,[39] and therefore cannot be regarded as codified by a statute forbidding discrimination. But if the *Menacho* decision be adopted as a guide to interpreting the Shipping Act, we submit that the following lan-

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[39] The court (C.C. S.D. N.Y.) was considering and applying common-law standards of reasonableness; at common law discrimination by a common carrier was not unlawful. The court said (27 Fed. at 531):

"Respecting preferences in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and except as thus restricted he *is free to discriminate at pleasure.* This is the equal justice to all which the law exacts from the common carrier in his relations with the public." (Italics added.)

guage from that decision would be controlling here (27 Fed. 533-4):

> The proposition is speciously put that the carrier may reasonably discriminate between two classes of shippers, the regular and the casual; and that such is the only discrimination here. Undoubtedly the carrier may adopt a commutative system, whereby those who furnish him a regular traffic may obtain reduced rates, just as he may properly regulate his charges upon the basis of the quantity of traffic which he receives from different classes of shippers. But this is not the proposition to be discussed. *The defendants assume to discriminate against the complainants, not because they do not furnish them a regular business, or a given number of shipments, or a certain quantity of merchandise to carry, but because they refuse to patronize the defendants exclusively.*
>
> * * * * *
>
> *The vice of the discrimination here is that it is calculated to coerce* all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage on the best terms they can. If it is tolerated, it will result practically in giving the defendants a monopoly of the carrying trade between these places. Manifestly it is enforced by the defendants in order to discourage ... others from attempting to serve the public as carriers between these

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places. *Such discrimination is not only unreasonable, but is odious.*[40] [Italics added.]

II

Section 15 of the Shipping Act Does Not Empower the Board to Approve the Contract/Non-Contract System

Section 15 provides in pertinent part as follows:

> Sec. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the [Federal Maritime Board] a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative

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[40] While *Menacho* dealt with the penalty system unaided by contracts, the decision broadly condemns the principle of exclusive dealing covered by rate discrimination. The means used to achieve the result are of no special significance. The decision does not hold, even by dictum, that higher rates may be imposed upon those who refuse to contract to boycott competitors (cf. R. 61).

working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The [Board] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that *it finds to be unjustly discriminatory or unfair as between carriers, shippers,* exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or *to be in violation of this Act,* and shall approve all other agreements, modifications, or cancellations. [Italics added.]

* * * * *

All agreements, modifications, or cancellations made after the organization of the [Board] shall be lawful only when and as long as approved by the [Board], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.[41]

The italicized language makes it plain that Section 15 is not a blanket grant of power to the Federal Maritime Board to exempt carriers or their agreements from other provisions of the Shipping Act, or to legalize practices which were illegal un-

[41] Section 15 exempts from the antitrust laws all lawful agreements pursuant to the Section. See Brief for the United States in *Far East Conference, et al.* v. *United States*, No. 1a Misc., which has been set for argument immediately following the instant case.

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der *that* Act.[42] The twin functions of Section 15 are to require the filing of carrier agreements, and to render unlawful all such agreements except those which the Board finds to meet all the conditions specified in the second paragraph of the Section, including the express requirement that they not "be in violation of this [Shipping] Act." Carrier agreements are expressly made unlawful until, and unless, approved by the Board. The Board's authority to approve is limited. It cannot approve any agreement which it finds to be unjustly discriminatory or unfair, to operate to the detriment of the commerce of the United States, or to be in violation of the Act. Thus, for example, even if the Board should decide that deferred rebates or fighting ships were desirable as methods of assuring stability of service by discouraging independents, and were not "unjustly discriminatory or unfair", the Board would not be entitled to approve them. For these practices are in violation of the Act, and could not be found to be otherwise.

Appellants argue that the use of "may" in the second paragraph of the Section confers discretionary power upon the Board to disapprove agreements or not as it sees fit. If the argument is that this discretion extends to withholding disapproval of unlawful agreements, it is patently unsound.

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[42] When Congress has seen fit to confer such exemption authority, it has done so clearly and unequivocally. *E.g.*, Civil Aeronautics Act of 1938, § 1, 52 Stat. 973, as amended, 49 U.S.C. 401.

The last clause of Section 15 provides that the Board "shall approve" all other agreements, etc. The plain implication is that it "shall not approve" any agreement which it finds to be unjustly discriminatory or unfair, or to the detriment of the commerce of the United States, or in violation of the Act. But the point, in any event, is of no significance. For Board disapproval is not a prerequisite to illegality under either Section 14 or Section 15. Violation of Section 14 is unlawful irrespective of Board action; and agreements can achieve validity under Section 15 only if affirmatively *approved* by the Board.

The Board's report does not attack the above propositions frontally. It does not in terms assert that the Board can sanction under Section 15 what Congress has flatly forbidden in some other section of the Act. But the report reaches the same result by concluding that to read Section 14 Third literally "would make any harmonious construction of the Act most difficult" (R. 60). We submit that no disharmony is to be found in the plain language of the statute once it is recognized that Section 15 is in terms subordinate because the approval power it confers is explicitly limited to agreements not in conflict with other sections of the Act.

One of the conditions to Board approval of an agreement under Section 15 is that it not be "unjustly discriminatory or unfair as between carriers, shippers * * * [etc.]" The Board appar-

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ently thought that the use of the term "unjustly" (and similar language in Sections 16 and 17) was inconsistent with the unqualified prohibition against "discriminating" methods in Section 14 Third. The Board's resolution of this asserted inconsistency was in effect to treat Section 15 as having amended Section 14 Third to add the words "unjustly or unreasonably" (R. 60).

We have pointed out in the discussion of Section 14 that the legislative history of the Act indicates that the qualifying adjectives were used or omitted in the various sections deliberately on a selective basis (*supra*, p. 29). Moreover, the use of the qualifications in some places and the flat prohibition in others is neither irrational nor inconsistent. The qualifying adjectives in Sections 15, 16, and 17 are found in provisions relating to general discrimination between carriers, shippers, ports, etc. Congress may well have recognized that some differences which would be called discrimination would inevitably occur in the rate structures and services rendered, and deliberately have left some leeway for such differences, if found by the Board not to be unjust or unreasonable. But when Congress dealt with retaliation in Section 14 Third, it was less tolerant. Even a little retaliation, achieved by a discriminating or unfair method, is a dangerous and undesirable practice. Congress presumably felt the same way about retaliation as it did about deferred rebates and fighting

ships, which it also forbade without qualification.[43]

Appellants urge that, apart from the term "unjustly discriminating" in Section 15, there are other persuasive indications that the Board's power to approve agreements is virtually absolute. Thus, for example, it is asserted that the Board may approve agreements "destroying competition" or granting "special rates," and it is argued that it would be inconsistent to regard any other sections as cutting down on these powers.

There are several conclusive answers to this contention. First, as has been pointed out, Section 15 in terms makes validity under the Act an indispensable prerequisite to Board approval of any agreement. Second, the references to special rates and destroying competition are found in the first paragraph of the Section, which is obviously a reporting requirement, not a grant of power to the Board. The paragraph is phrased in the broadest terms in order to assure that all relevant carrier agreements are covered; it certainly does not import legality to any and all devices which could fall within its all-embracing terms.[44] If it did, the

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[43] A similar deliberate differentiation is found in the Interstate Commerce Act as between the general discrimination provisions and those absolutely prohibiting discrimination against connecting carriers. See opinion of Judge Learned Hand in *Baltimore & O. R. Co.* v. *United States*, 22 F. Supp. 533, 538 (N.D. N.Y.) (discussed in Judge Frank's appendix, R. 140-1).

[44] It is significant that the language of the paragraph was apparently taken from the comprehensive resolutions which authorized the initial investigation by the House Committee on Merchant Marine and Fisheries that culminated in the

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deferred rebate (a "special rate" that destroys competition) and the fighting ship (a device for controlling or destroying competition which usually involves "pooling * * * losses") would be suitable candidates for approval under Section 15. And a provision which does not purport to be a grant of power to the Board would thereby render nugatory an express limitation on the Board's power contained in the succeeding paragraph—namely, the condition that only agreements not violative of the Act may be approved.

Appellants argue that the philosophy of this Act is one of eliminating cutthroat competition, that Congress preferred regulated monopoly to the chaos of destructive competition, that for this reason it empowered the Board to approve the conference system, that the contract/non-contract system is essential to the maintenance of the conference system, and that the Board is empowered to approve this destructive practice (or any other destructive practice not prohibited by name) against independents. If the clear language of the Act left any doubt that appellants misconceive the statutory scheme, that doubt would be resolved by the legislative history.

Alexander report. See H. Res. 425, ~~487~~ 567, 62nd Cong., 2nd Sess. (Alexander report, pp. 8, 9).

Representative Saunders, a member of the Alexander Committee, described this provision as one "designed to enable the [Board] to intelligently discharge their duties. It advises them as to the situation. It informs them as to the relationship of the carriers. It apprises them of unfair practices." 53 Cong. Rec. 8106.

The Alexander report reflects a conclusion that there are special problems in the shipping industry which render the maintenance of unrestricted competition difficult and in some respects undesirable (pp. 295-304, 415-7). At the same time, however, the framers were acutely aware of the numerous evils which have attended the combinations of shipping lines in conferences—abuses which resulted in discriminations against shippers and ruthless and predatory attacks upon independents (pp. 304-307, 417-419). The framers of the Act declined either to recommend measures to create unrestricted competition or to exempt the conferences entirely from Government regulation, and thereby leave them free to establish a private government for the shipping industry in which shippers would be governed but not represented, and independent carriers would be eliminated. The Committee chose instead to propose machinery under which the conference system and agreements made by carriers could, with certain limitations, be approved by the Board and thereby rendered lawful. But the Board was not to be given a completely free hand, as appellants seem to suggest. For specified kinds of conduct were to be explicitly outlawed.

The statutory scheme which the Alexander Committee evolved (and which emerged substantially unchanged in the Shipping Act) is a far cry from an endorsement of action by conferences to create stability by eliminating independents. There was

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no express or implied intention to sanction, or permit the Board to sanction, driving out independents by fair means or foul, and thus to bring to the industry the kind of stability which is implicit in a 100 percent conference monopoly.[45] In framing its recommendations, the Committee proposed to give the administrative agency broad investigatory and regulatory powers. See, *e.g.*, recommendations (2), (3), and (5) (pp. 419-21). But in recommending prohibitions against the practices it considered particularly harmful or unfair, the Committee did not suggest that the prohibitions be subject to exemption or modification by the governmental agency. Recommendation (6) (obviously the principal source of Section 14 Third) is as follows (p. 421):

> (6) That the use of "fighting ships" and deferred rebates be prohibited in both the

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[45] The recommendations of the Alexander Committee contain the following pointed comments with respect to abuses in foreign commerce (pp. 417, 418):

"A considerable number of complaints were also filed with the Committee objecting to excessive rates, discrimination between shippers in rates and cargo space, indifference to the landing of freight in proper condition, arbitrariness in the settlement of just claims, failure to give due notice to shippers when rates were to be increased, refusal to properly adjust rates as between various classes of commodities, and the unfairness of certain methods—such as fighting ships, deferred rebates, and threats to refuse shipping accommodations—used by some conference lines to meet the competition of non-conference lines.

* * * * *

"Abuses exist, and the numerous complaints received by the Committee show that they must be recognized. In nearly all the trade routes to and from the United States the conference lines have virtually a monopoly of the line service."

> export and import trade of the United States. Moreover, all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason.[46]

The debates in Congress were mainly focused upon the shipbuilding phases of the bill rather than the regulatory phases,[47] and are therefore somewhat inconclusive. But the debates certainly do not indicate that Congress thought it was creating machinery to validate unrestricted warfare on independents. The arguments of appellants in this connection are to be contrasted with the following statement on the Floor of the House by Representative James F. Byrnes, a member of the Alexander Committee (53 Cong. Rec. 8087):

> The regulatory features of the bill are agreed to by all fair-minded men. They seek simply to enable an independent shipowner to carry on his business, without having the shipping trust drive him out by discriminatory or unfair practices.[48]

If Representative Byrnes accurately expressed the

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[46] And see recommendation (4), p. 421.

[47] *E.g.*, 53 Cong. Rec. 8082-94, 8096-8104, 8107-8110, 12341-12345, 12346-12353.

[48] And see statement of Representative Helm (53 Cong. Rec. 8263) that one of the purposes of the bill was to be "an entering wedge to split up the Shipping Trust", and statement of

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legislative purpose, nothing could be more in conflict with that purpose than the construction urged by appellants.

The argument that the penalty rate system is essential to the successful functioning of the conference system also must fail. First, there is no indication that Congress considered the penalty rate system or any other measure for coercing exclusive patronage of conferences a permissible method of competition. The Act and the legislative history reflect the opposite view. Even if the penalty rate system were the *sine qua non* of conference survival, the Board would be powerless to abrogate express prohibitions of the Shipping Act to make use of the system possible. Second, there is no evidence in the record that conference members need to rest upon the crutch of discriminatory rates in order to get business. The continued existence of many conferences which do not use contract/non-contract rates, or do not apply them to commodities generally, attests the fact that the penalty rate system is not indispensable.

Representative Burke (a member of the Alexander Committee) that (53 Cong. Rec. 8095):

"This investigation disclosed the unfair practices resorted to by water carriers for the purpose of destroying competition, and of discriminating and retaliating against persons and places who would not tamely submit to their dictation. * * *

"Your committee at the conclusion of such hearings and after consideration and due deliberation made its report to Congress upon the subject with many valuable recommendations. Among the recommendations made in such report to Congress were that laws should be passed prohibiting the grossest and more vicious of such unfair practices * * *"

See also 53 Cong. Rec. 8105.

CONCLUSION

For the foregoing reasons the judgment should be affirmed.

Respectfully submitted,

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JANUARY 1952.

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APPENDIX

The Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, provides in pertinent part as follows:

> Sec. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—
>
> First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.
>
> Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense. [46 U.S.C. 812]

* * * * *

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the [Board] a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privi-

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leges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The [Board] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the [Board] shall be lawful until disapproved by the [Board]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the [Board].

All agreements, modifications, or cancellations made after the organization of the [Board] shall be lawful only when and as long as approved by the [Board], and before approval or after disapproval it shall be unlaw-

ful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action. [46 U.S.C. 814]

Sec. 16. That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to

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this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense. [46 U.S.C. 815]

Sec. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their

foreign competitors. Whenever the [Board] finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the [Board] finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice. [46 U.S.C. 816]

* * * * *

Sec. 19. That whenever a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitive carrier by water, it shall not increase such rates unless after hearing the [Board] finds that such proposed increase rests upon changed conditions other than the elimination of said competition. [46 U.S.C. 818]

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